155-550

# RECORD, CASE No. 14,543.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1890.~~ ~~695~~ ~~445~~ 109

WILLIAM McCABE, APPELLANT,

*vs.*

JOHN O. MATTHEWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED MARCH 28, 1891.

# RECORD, CASE No. 14,543.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1891.

TERM No., 1080.

WILLIAM McCABE, APPELLANT,

*vs.*

JOHN O. MATTHEWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 21, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 21, 1892.

1 In the Circuit Court, Fifth Judicial Circuit of the United States, Northern District of Florida. In Chancery.

To the judges of said court:

Your orator, William McCabe, a subject of her majesty Victoria, Queen of Great Britain and Ireland and Empress of India, residing and having his citizenship in the city of Toronto, in the Province of Ontario and Dominion of Canada, brings this his bill of complaint against John O. Matthews, a citizen of the State of Florida, and for cause of complaint says:

1st. That on or about the ninth day of February, A. D. 1880, one Frances G. Montgomery, widow, being seized in fee and possessed of a certain lot, piece, or parcel of land situate, lying, and being in the county of Volusia, State of Florida, formerly known as the property of John Addison, being section 40, T. 13 S., of R. 32 E., and sec. 37, T. 14 S., of R. 32 E., containing 1,635 acres, lying on Tomoka river, being a grant of land by the Spanish government to John Addison, entered into a certain written contract and agreement with the defendant, Matthews, whereby she, for a valuable consideration, covenanted and agreed to convey to said Matthews the said tract of land, said contract and agreement to be at the refusal of the said Matthews, party of the second part, for the period of forty-five days from said date. A copy of said agreement is hereto attached, marked Exhibit A, and prayed to be taken as a part of this bill.

2nd. That the said Matthews, upon the execution of said contract by said Montgomery, on the next day thereafter, to wit, the 10th day of February, A. D. 1880, for a valuable consideration, sold and assigned to your orator, his heirs and assigns, a one-half undivided interest in his said contract with said Montgomery and the

2 said therein-described 1,635 acres of land by a written instrument, under seal, executed in the presence of two witnesses. A copy of said written instrument is hereto attached, marked Exhibit B, and prayed to be taken as a part of this bill.

3rd. That the said Matthews afterwards, on the same day, to wit, the 10th day of February, A. D. 1880, in the city of Jacksonville, Florida, for a valuable consideration, executed and delivered to your orator a written instrument, under seal, signed, sealed, and delivered in the presence of two witnesses, whereby the said Matthews, in consideration of the sum of one dollar to him in hand paid by your orator, the receipt whereof was thereby acknowledged, — of the further sum of one hundred dollars, for which said Matthews was to draw upon your orator with his deed to your orator, his heirs and assigns, for a one-half undivided interest in said lands attached, when the said Montgomery should make to said Matthews the deed of said lands referred to in her said agreement, and of the further sum of fifty dollars to be paid by your orator after the issue of the patent for said lands and the completion of any proceedings founded on said patent, when issued, deemed necessary, in connection with said patent, to fortify the title to said lands and render it more marketable, the expenses connected with which

issue and said proceedings connected therewith to be borne solely by your orator, sold and assigned to your orator, his heirs and assigns, an undivided one-half interest in said agreement between said Matthews and said Montgomery and in said lands, and covenanted and agreed to make to your orator, his heirs and assigns, a deed for a one-half undivided interest in said lands, and to attach the same to a draft on your orator for the sum of one hundred dollars within three months *for* the date of said contract,
3 which said instrument was duly proven for record and on the 23rd day of December, A. D. 1880, duly recorded in Book G, on pages 250, 251, & 252 of the public records for Volusia county, Florida. A copy of said contract, with certificate of record, is hereto attached, marked Exhibit C, and prayed to be taken as a part of this bill.

4th. That your orator is informed and believes and so charges that said Matthews notified said Montgomery of the acceptance of her proposition or agreement—a copy of which is hereto attached, marked Exhibit A—before the forty-five days expired, as was provided in and by said contract, and that said Montgomery, upon receipt of said notice, notified said Matthews that she was ready to execute the deed at once.

5th. That your orator, having entered into said contracts with said Matthews, proceeded to Enterprise, the county-seat of Volusia county, for the purpose of investigating the claims of one Stephen Snow to said lands or a part of them, it having been reported to your orator and said Matthews that said Snow claimed to be in possession of said lands or a part thereof; that in the investigation of said claim your orator expended his time and money and obtained valuable information concerning said lands and the title thereto, which was communicated by your orator to said Matthews, and shortly thereafter returned to his home in Toronto, Canada, and kept in correspondence with said Matthews and instructed said Matthews to draw on your orator with the deed from said Matthews to your orator attached, as was provided in and by said contract between said Matthews and your orator. Your orator, about the 27th of June, 1880, received from said Matthews a letter dated June 20th, 1880, which was, according to the recollection of your orator, the last communication received from said Matthews for several years;
4 that your orator subsequently wrote to said Matthews concerning the subject-matter of said contract between them, but received no answer; that your orator, finding that said Matthews did not answer his communications, had said contract between said Matthews and himself proven for record, and caused the same to be recorded in the office of the clerk of the circuit court for Volusia county, Florida, on the 23rd day of December, A. D. 1880.

6th. That some time subsequent to the execution of said contract between said Matthews and your orator, the exact date being unknown to your orator, the said Matthews procured a deed from said Montgomery conveying said lands in said contract described to said Matthews, said deed as recorded bearing date the first day of July, A. D. 1882, and recorded in the office of the clerk of the circuit

court of Volusia county, Florida, on the 14th day of July, A. D. 1884, and entered into possession of said lands and now holds the same under and by virtue of a deed made to him by the said Montgomery.

7th. That said Matthews, in fraud of your orator's rights and with a purpose to defraud your orator, kept the fact of his having obtained a deed and possession of said lands from the said Montgomery a secret from your orator, who was not informed thereof until the spring of the year 1887, when he was notified by the clerk of the circuit court for Volusia county, Florida, that the said Matthews had made oath that he was the owner of said lands and applied to redeem the same from a tax sale, the certificate of which had been purchased by your orator from the comptroller of the State of Florida.

8th. That your orator, who was then at his home in Toronto, Canada, thereupon procured from the clerk of the circuit
5 court for Volusia county, Florida, an abstract of the title to said lands, whereon appeared the said deed from said Montgomery to said Matthews; that your orator, as soon thereafter as it was practicable for him to leave his business affairs at his said home, in February, A. D. 1888, came to Florida to assert and maintain his rights in the premises, and employed to represent him in the matter the law firm of Fleming & Daniel, who at once notified said Matthews that your orator intended to maintain his rights, and demanded that said Matthews comply with the terms of the said contract with your orator and convey to your orator an undivided half interest in said lands as he had contracted to do, and notified said Matthews of the readiness of your orator to comply with the terms of said contract.

9th. That your orator has always been and still is ready and willing to comply with all the terms of said contract by him stipulated to be kept and performed, but that said Matthews wholly refused and still refuses to comply with the terms of his said contract with your orator to convey to your orator an undivided half interest in said lands, in fraud of your orator's rights and to the great and irreparable injury of your orator in the premises.

10th. That your orator is informed and believes and so charges on information and belief that said Matthews has conveyed or attempted to convey and mortgaged or attempted to mortgage to persons to your orator unknown pieces or parcels of said tract of land; all of which your orator charges is done in fraud of your orator's rights in the premises, and that your orator has reason to fear and does fear that, unless restrained by an order of this court, the said Matthews will make other conveyances of said lands and place other mortgages thereon in fraud of your orator's rights in the premises.

6 To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein and hereby prayed, and that he may, to the best of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the allegations of the foregoing

bill as fully, to all intents and purposes, as though he were particularly interrogated thereto, may it please your honor to grant unto your orator the State's most gracious writ of injunction, directed to the said defendant, John O. Matthews, restraining him and his agents, servants, and attorneys from selling or offering for sale or mortgaging or in any manner disposing of or incumbering the lands above described; and may it please your honor to grant unto your orator the relief to which he is entitled in the premises, and that this court will declare that your orator is entitled to a specific performance and execution of the said contract or agreement hereto attached, marked Exhibit C, and will decree the same accordingly; that the court will decree to your orator his costs in this suit; that for the purposes aforesaid all proper inquiries may be made, accounts taken, and directions given, and that the plaintiff may have such other and further relief as the nature of his case may require.

And that the State's most gracious writ of subpœna may issue, directed to the said John O. Matthews, commanding him to be and appear before this honorable court on a day certain and under a penalty therein to be named, — and there to stand to, abide by, and perform such order, direction, and decree as to your honor shall seem meet and shall be agreeable to equity; and your orator will ever pray, &c.

J. M. BARRS,
*Solicitor for Complainant.*

7 STATE OF FLORIDA, }
*County of Duval.* }

Before me personally appeared William McCabe, to me well known, who, being first duly sworn, deposes and says that he is the complainant in the foregoing bill of complaint; that he has read the same and knows the contents thereof; that all matters and things therein stated as of his own knowledge he knows to be true, and that as to those matters and things stated as upon information and belief he believes them to be true.

WM. McCABE.

Sworn to and subscribed before me this 1st day of March, A. D. 1889.

J. M. BARRS,
*Notary Public.*

8 EXHIBIT A.

Copy.

GRAYSTOCK GROVE, NEAR REMINGTON PARK,
ST. JOHN'S COUNTY, FLA., *February 9th*, 1880.

This agreement, made this day, between Frances G. Montgomery, of the above-named county and State, of the first part, and John O. Matthews, of the county of Marion and State of Florida, of the second part, witnesseth:

That for and in consideration of the sum of one dollar paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hath agreed to bargain, sell, grant, and convey by deed all her interest, right, title, and estate which she has as sole heir of David Montgomery to the following-described tract of land, situate in the county of Volusia, State of Florida, formerly known as the property of John Addison: Section 40, T. 13 S., of R. 32 east, and sec. 37, T. 14 S., of R. 32 east, containing 1,635 acres, lying on Tomoka river, being a grant of land by the Spanish government to John Addison, unto the party of the second part, and in consideration of a tract of land situated near Orange lake, containing five acres, the same to be planted out with five hundred orange stumps and the stumps budded with sweet buds and warranted to grow, and the party of the second part is to fence the lands and keep the trees from being damaged by stock of any kind, this agreement to be at the refusal of the party of the second part for the period of forty-five days from this date.

In witness whereof I have set my hand and seal the day and date above written.

(S'd) FRANCES G. MONTGOMERY. [SEAL.]

Signed in presence of—
ALBERTA C. LOVELACE.
ANNIE L. LANCASTER.

9 EXHIBIT B.

Copy.

For value received, as per my agreement of this date, I hereby sell and assign to William McCabe, his heirs and assigns, a one-half undivided interest in the within agreement and the said within-described 1,635 acres of land.

Witness my hand and seal the 10th day of February, 1880.

(S'd) J. O. MATTHEWS. [SEAL.]

In presence of—
MARY B. FOLSOM.
SAMUEL MANN.

10 EXHIBIT C.

Copy.

Whereas Frances G. Montgomery, of St. John's county, Florida, has, on the 9th day of February, 1880, agreed in writing to grant and convey to me by deed all her estate and interest in sec. 40, in T. 13 S., of R. 32 east, and section 37, in T. 14 S., of R. 32 east, containing 1,635 acres, in Volusia county, Florida, subject to my refusal for forty-five days, for the consideration named in her agreement:

Now, therefore, in consideration of the sum of one dollar to me in hand paid by Wm. McCabe, of Tallahassee, Florida, the receipt

whereof is hereby acknowledged, — of the further sum of one hundred dollars, for which I am to draw upon said Wm. McCabe with my deed to him, his heirs and assigns, for a one-half undivided interest in said lands attached, when I deliver to said Montgomery the deed to her referred to in said agreement and she makes to me the deed of said lands therein referred to in her said agreement, and of the further sum of fifty dollars to be paid by said Wm. McCabe after the issue of the patent for said lands and the completion of any proceedings founded on said patent, when issued, deemed necessary, in connection with said patent, to fortify the title to said lands and render it more marketable, the expenses connected with which issue and said proceedings connected therewith are to be borne solely by said McCabe, I do hereby sell and assign to said William McCabe, his heirs and assigns, a one-half undivided interest in said agreement of said Montgomery and in said lands so to be conveyed by her to me as aforesaid, and agree to make to the said McCabe, his heirs and assigns, a deed for said interest in said lands and to attach the same to said draft on him as aforesaid within three months from the date hereof, it being under-
11 stood that the expenses connected with the claim of one Stephen Snow to said lands or a part of them and all other expenses shall be borne equally by said McCabe and myself as joint equal owners of said lands so to be conveyed as aforesaid.

In witness whereof I hereto set my hand and seal, at Jacksonville, Fla., this 10th day of February, A. D. 1880.

(S'd) J. O. MATTHEWS. [SEAL.]

Signed, sealed, and delivered in the presence of—
MARY FOLSOM.
SAMUEL MANN.

STATE OF FLORIDA, }
*County of Duval.* }

Before me, the undersigned, a notary public in and for the State of Florida, on this 20th day of December, A. D. 1880, personally appeared Mrs. Mary C. Folsom, one of the subscribing witnesses to the foregoing and annexed instruments in writing, who, being duly sworn, deposed and said that she well knew John O. Matthews, party to said deeds, and that he executed the same in her presence and that of Samuel Mann, the other subscribing witness thereto, and that the said John O. Matthews acknowledged that he executed and delivered the said foregoing deed and the instrument attached to Wm. McCabe for the purposes therein mentioned.

(S'd) MARY C. FOLSOM.

Sworn to and subscribed before me this 20th day of Dec., A. D. 1880.

12 In testimony whereof I hereunto affix my hand and official seal the day and year last above written.

(S'd) P. F. WETHINGTON,
*Notary Public.*

STATE OF FLORIDA, }
*Volusia County.* }

I, John W. Dickens, clerk circuit court for said county, certify that the attached instrument has been recorded in Deed Book G, on page- 250, 251, and 252, of Volusia county records.

In testimony whereof I have set my hand and affixed my official seal this 23rd of December, A. D. 1880.

(S'd) JOHN W. DICKENS, *Clerk.*

Endorsement: In United States circuit court, 5th judicial circuit, northern district of Florida. In chancery. Wm. McCabe *vs.* John O. Matthews. Bill. Filed this 1st day of March, 1889. Philip Walter, clerk. J. M. Barrs, sol. for compl't.

13 UNITED STATES OF AMERICA, }
*Northern District of Florida.* }

The President of the United States of America to John O. Mathews, a citizen & resident of the State of Fla.:

We command you and every of you that you appear before the judges of the circuit court of the United States of America for the fifth circuit and northern district of Florida, at Jacksonville, in said district, on the first Monday, being the 1st day, of April next, to answer to a bill of complaint exhibited against you by Wm. McCabe, a subject of Her Majesty Victoria, Queen of Great Britain & Ireland and Empress of India, and filed in the clerk's office of said court, and then and there to receive and abide by such judgment and decree as said court shall have considered in this behalf; and this you are not to omit upon pain of judgment by default being pronounced against you.

To the marshal of the United States to execute and return.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this [SEAL.] court, at the city of Jacksonville, in said district, this 1st day of March, A. D. 1889.

PHILIP WALTER, *Clerk.*

J. M. BARRS,
*Solicitor for Compl't.*

*Memorandum.*

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Jacksonville aforesaid, on or before the day to which the above is returnable, the complaint will be taken against him as confessed and a decree entered accordingly.

PHILIP WALTER, *Clerk.*

14 [Endorsed:] No. —. Circuit court United States, northern district of Florida. Wm. McCabe *vs.* John O. Mathews.

Chancery subpœna. Returnable to rule day, first Monday in April, A. D. 1889. Philip Walter, clerk. Filed Mar. 2, A. D. 1889. Philip Walter, clerk. —— ——, complainant's solicitor.

Received this subpœna March 1st, 1889, and executed it March 1st, 1889, by delivering a true copy hereof, in the northern district of Florida, to the within-named defendant, John O. Mathews, and at the same time explaining this original.

March 2nd, 1889.

W. C. BIRD,
*U. S. Marshal,*
By J. A. VINZANT, *Deputy.*

Paid marshal's costs, $2.50.

P. WALTER, *Clerk.*

15 In the Circuit Court of the United States, Northern District of Fla. In Chancery.

WM. M. McCABE
*vs.*
JOHN O. MATHEWS.

*The Demurrer of John O. Mathews to the Bill of Complaint of Wm. M. McCabe, the Above-Named Plaintiff.*

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that the plaintiff hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any relief from this defendant as to the matters contained in said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be dismissed hence with his costs in this behalf most wrongfully sustained.

H. BISBEE & SON,
*Deft's Solicitors.*

16 I hereby certify that in my opinion the above demurrer is well founded in point of law.

H. BISBEE & SON,
*Deft's Solicitors.*

NORTHERN DISTRICT OF FLORIDA, }
*County of Marion.* }

Personally appeared before me, John G. Reardon, a notary public at large for said State, John O. Mathews, to me well known, who,

having been sworn, upon oath says that the foregoing demurrer is not interposed for the purpose of delay.

JOHN O. MATTHEWS.

In witness whereof I have hereunto set my hand and official seal this the 29th day of March, A. D. 1889.

JNO. G. REARDON,
[SEAL.] *Notary Public, State of Florida.*

Endorsement: In the circuit court of the United States, northern district of Florida. In chancery. Wm. M. McCabe *vs.* John O. Mathews. Demurrer. Filed Mar. 30, 1889. Philip Walter, clerk. H. Bisbee & Son, defendant's solicitors.

17 In the Circuit Court of the United States, Northern District of Florida. In Equity.

WILLIAM MCCABE
*vs.*
JOHN O. MATHEWS.

This cause came on to be heard upon demurrer to complainant's bill of complaint and was argued by counsel. On consideration thereof the court orders and decrees that the said demurrer be, and is hereby, sustained, and that the complainant's bill of complaint be, and is hereby, dismissed.

April 13th, 1889.

HARRY T. TOULMIN, *Judge.*

Endorsement: In the circuit court of the United States, northern district of Fla. In equity. William McCabe *vs.* John O. Mathews. Order sustaining demurrer and dismissing complainant's bill of complaint. Filed April 13, 1889. Philip Walter, clerk. H. Bisbee & Son, defendant's solicitors.

18 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida. In Chancery.

WILLIAM MCCABE
*vs.*
J. O. MATTHEWS.

The above-named complainant, conceiving himself ag-*reived* by the final decree entered on the 13th day of April, A. D. 1889, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, to a day in October, 1890, term thereof, to wit, the sixth day of April, A. D. 1891; and he prays that his appeal may be allowed and a transcript of the record and proceedings in the cause duly authenticated may be sent to the Supreme Court.

J. M. BARRS,
*Complainant's Solicitor.*

Issuance of citation and serving of same is hereby waived for the defendant, J. O. Matthews, in the above-entitled cause.

H. BISBEE,
*Solicitors for the Defendant.*

Endorsement: In circuit court of United States, northern dist. of Fla. In chancery. William McCabe *vs.* J. O. Matthews. Entry of appeal. Filed Mar. 10, 1891. Philip Walter, clerk. J. M. Barrs, compl't's sol.

19 In Circuit Court of the United States, Fifth Circuit, Northern District of Florida. In Chancery.

WILLIAM MCCABE }
*vs.*
J. O. MATTHEWS. }

This cause coming on to be further heard on application for the allowance of an appeal to the Supreme Court of the United States, it is ordered that said appeal be, and the same is hereby, allowed and granted.

Done this 9th day of March, 1891.

CHAS. SWAYNE,
*U. S. Judge.*

Endorsement: In United States circuit court, northern district of Florida. In chancery. William McCabe *vs.* O. J. Matthews. Order allowing appeal. Filed Mar. 10, 1891. Philip Walter, clerk.

20 In Circuit Court of United States, Fifth Circuit, Northern District of Florida. In Chancery.

WILLIAM MCCABE }
*vs.*
J. O. MATTHEWS. }

Know all men by these presents that we, William McCabe, as principal, and Alexander B. Campbell and J. H. Crosby, Jr., as sureties, both of the city of Jacksonville, Florida, are held and firmly bound unto the said defendant, to wit, J. O. Matthews, in the sum of five hundred dollars, to be paid to the said defendant; to which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators respectively, jointly and severally, firmly by these presents.

Signed, sealed, and delivered this 2nd day of March, A. D. 1891.

The condition of the above obligation is such that whereas said complainant, to wit, William McCabe, has appealed to the Supreme Court of the United States to reverse the final decree rendered herein on the thirteenth day of April, A. D. 1889:

Now, therefore, if the said complainant shall prosecute said appeal to effect and pay all costs if he shall fail to make good his appeal,

then this obligation to be void; otherwise to remain in full force and virtue.

WM. McCABE. [SEAL.]
ALEX. B. CAMPBELL. [SEAL.]
J. H. CROSBY, JR. [SEAL.]

21 Signed, sealed, and delivered in presence of—
H. B. PHILLIPS.
E. H. VAIL.

Endorsement: In United States circuit court, northern dist. of Florida. In chancery. William McCabe *vs.* J. O. Matthews. Appeal bond. Filed Mar. 10, 1891. Philip Walter, clerk. J. M. Barrs, compl't's sol.

22 In the Circuit Court of the United States, Fifth Circuit, Northern District of Florida. In Chancery.

WILLIAM McCABE }
*vs.*
J. O. MATTHEWS. }

This cause coming on to be further heard on presentation of the appeal bond herein, it is ordered and directed that said appeal bond be, and the same is hereby, approved.

Done this 9th day of March, 1891.

CHAS. SWAYNE,
*U. S. Judge.*

Endorsement: In United States circuit court, northern district of Fla. In chancery. William McCabe *vs.* J. O. Matthews. Order approving appeal bond. Filed Mar. 10, 1891. Philip Walter, clerk.

23 In the Circuit Court of the United States, Northern District of Florida. In Chancery.

WILLIAM McCABE }
*vs.* } *ss:*
J. O. MATTHEWS. }

The undersigned, George Mayer Wallace, doctor of medicine, of the city of Daytona, in the county of Volusia and State of Florida, being duly sworn, deposes and says:

1. That he was on, before, and since the 13th day of April, A. D. 1889, and still is well acquainted with the tract of land and its value known as the John Addison grant, being section 40, in township 13 south, of range 32 east, and section 37, in township 14 south, of range 32 east, containing 1,635 acres of land, situated, lying, and being in the said county of Volusia and State of Florida, and distant about twelve miles from his said residence, and that the value of the said grant or tract of land as above described was on the said 13th

day of April, A. D. 1889, and now is more than fifteen thousand dollars.

G. M. WALLACE, M. D.

Sworn to and subscribed before me at Deland, Volusia county, Florida, this 18th day of March, A. D. 1891.

J. B. JOROW,
[SEAL.] *Cl. Ct. Ct.*

Endorsement: In circuit court of United States, northern dist. of Florida. In chancery. William McCabe *vs.* J. O. Matthews. Affidavit of George M. Wallace. I consent to filing within for purpose of showing value of property involved. H. Bisbee, solicitor for defendant. Filed Mar. 19, 1891. Philip Walter, clerk. J. M. Barrs, compl't's sol.

21 In the Circuit Court of the United States, Northern District of Florida. In Chancery.

WILLIAM MCCABE }
*vs.* } *ss:*
J. O. MATTHEWS. }

The undersigned, Joseph Haynes Gittens, of the city of Daytona, in the county of Volusia and State of Florida, Esquire, being duly sworn, deposes and says:

I. That he was on, before, and since the 13th day of April, A. D. 1889, and still is well acquainted with the tract of land and its value known as the John Addison grant, in Volusia county, Florida; that said grant is section 40, in township 13 south, of range 32 east, and section 37, in township 14 south, of range 32 east, in said county of Volusia and State of Florida, and that the value of said grant and lands as above described was on the said 13th day of April, A. D. 1889, and now is over fifteen thousand dollars.

J. H. GITTENS.

Sworn to and subscribed before me, at Deland, Volusia county, Florida, this 18th day of March, A. D. 1891.

[SEAL.] J. B. JORDAN, *Cl. Ct. Ct.*

Endorsement: In United States circuit court, northern dist. of Fla. In chancery. William McCabe *vs.* J. O. Matthews. Affidavit of J. H. Gittens. I consent to filing within for the purpose of showing value of property involved. H. Bisbee, solicitor for def't. Filed M'ch 19, 1891. Philip Walter, clerk. J. M. Barrs, compl't's solicitor.

25 I, Philip Walter, clerk of the United States circuit court, fifth judicial circuit, northern district, do hereby certify that the foregoing pages, numbered from one to twenty-five, both inclusive, *is* a true and correct transcript of the record in the case of Wm. McCabe *vs.* John O. Matthews, from the files in my office.

Seal U. S. Circuit Court, Northern Dist. of Florida, Fifth Circuit.

In witness whereof I have hereunto set my hand and official seal, at the city of Jacksonville, in the district and circuit aforesaid, this 20th day of March, A. D. 1891, and of our Independence the 115th year.

PHILIP WALTER, *Clerk*,
By JNO. G. DRIGGS,
*Deputy Clerk.*

Endorsed on cover: Case No. 14,543. N. Florida C. C. U. S. No. 1080. William McCabe, appellant, *vs.* John O. Matthews. Filed March 28, 1891.

Office Supreme Court, U.S.
FILED.
NOV 28 1894
JAMES H. McKENNEY,
CLERK

# Supreme Court of the United States.

**OCTOBER TERM, 1894.**

*Term No.*, ~~1000~~. 109

WILLIAM McCABE, APPELLANT,

*vs.*

JOHN O. MATTHEWS, APPELLEE.

## BRIEF FOR APPELLANT.

HENRY WISE GARNETT,
*Attorney for Appellant.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States.

## OCTOBER TERM, 1894.

*Term No., 1080.*

WILLIAM McCABE, Appellant,

*vs.*

JOHN O. MATTHEWS, Appellee.

## BRIEF FOR APPELLANT.

This is a bill filed in the circuit court of the United States, northern district of Florida, for an injunction against the appellee to prevent his selling or mortgaging certain lands and to compel specific performance of a contract by the appellee to convey a one-half interest in certain lands in Florida. To this bill a general demurrer was filed; which demurrer was sustained and the bill dismissed by the court below, from which decree an appeal was taken to this Court.

The appellant is a resident and citizen of Canada and the appellee a resident and citizen of the State of Florida.

There was no opinion filed by the justice holding the district court.

## Assignment of Errors.

The appellant makes this his assignment of errors and says that in the record, proceedings, and decree in this cause the justice holding the said district court erred—

1st. In refusing to grant the prayer of the appellant's bill praying that the appellee, his agents, servants, and attorneys, be restrained from selling or mortgaging the lands involved in this cause.

2d. In refusing to grant to the appellant the specific performance of the contract against the appellee as prayed for in the appellant's bill.

3d. In refusing the relief prayed for by the appellant sustaining the demurrer to his bill and dismissing the bill.

The facts of this case, as shown by the record, are as follows:

The appellee, having a contract or agreement in writing which gave him a right of purchase to a tract of land, with right of refusal on his part within a certain number of days, for a valuable consideration assigned in writing to the appellant a half interest in such contract or agreement, and also by written contract or agreement agreed to convey such one-half interest when he obtained a conveyance to him (the appellee) and to forward a deed therefor within three months from the date of the agreement between the appellant and the appellee.

The appellant, under his said contract with the appellee, performed certain labor and expended certain money in connection with a claim against certain part of the land, and thereby obtained and furnished the appellee valuable information in reference to the said land and the title thereto.

The appellee did complete the purchase under his original contract within the time limited, but failed to forward the deed to the appellant, who had returned to his home in Canada. The appellant, being ignorant of the completion of the purchase by appellee and having in vain instructed him to draw on him, forwarded to Florida the agreement between himself and the appellee, and had the same duly recorded there within less than a year after it was made.

The appellee, after completing the purchase from the original vendor, waited two years before taking his deed from said vendor, and after receipt of said deed delayed two years more before recording it. The appellant did not learn of the completion of the purchase by and deed to the appellee until about three years after it was recorded; as soon as he could thereafter leave Canada and visit Florida (which was within less than a year after he received the information) he made demand on the appellee and retained counsel and filed this bill within two years after he first learned of the appellee's completion of the purchase and having obtained the said deed.

It is submitted—

1st. That the appellant is entitled to a specific performance of the contract and an injunction as prayed.

Specific performance is discretionary with the court, but—

"The discretion is nevertheless judicial, to be exercised in obedience to established principles; and where a contract respecting real property is, in its nature and circumstances, unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it."

Hall *vs.* Warren, 9 Ves., 608.

Old Colony Railroad Co. *vs.* Evans, 6 Gray, 36.

If the appellee had within three months after completing his purchase from the vendor forwarded the deed to appellant, as contracted between them, he could, in equity, have

compelled specific performance by the appellant. By his failure to obtain a conveyance and comply with his agreement the appellant does not lose his right. Time does not enter into the contract as against the appellant; if it did, the appellant would have been at the mercy of the appellee.

Time is not treated as the essence of a contract by a court of equity unless expressly made so or shown by circumstances to be so.

Gunton *vs.* Carroll, 101 U. S., 426.
Taylor *vs.* Langworth, 14 Peters, 172.

In this case Taylor was to have delivered a deed within three months from date of contract, and the court refers to this as follows:

"The first remark that occurs is that the first default was on the part of Taylor."

And again says:

"If the contract had been strictly performed on the part of Taylor by a conveyance, he would now have stood in the mere character of a mortgagee, for in that event Langworth stipulated to give him a mortgage for the security of the unpaid purchase-money. Now, in the view of a court of equity, that may well be deemed the true posture of this case upon the known principle that equity will, for the purposes of justice, treat that to have been done which ought to have been done."

Applying the law as laid down to this case, the appellee had contracted to convey to appellant within three months. He closed the sale and could and should have done so within that time. He willfully refrained from obtaining a deed for two years and kept it off of record for two more. Equity will not permit him to profit by his failure to perform his own contract, but, finding him now in possession of the land

in a suit between him and the appellant, will treat that to have been done which ought to have been done.

In equity time may be dispensed with if it be not of the essence of the contract.

Hepburn *vs.* Auld, 5 Cr., 262.
Ahl *vs.* Johnson, 20 How., 511.
Pomeroy on Contracts, § 392, p. 465, and § 403, p. 433.

In this case, the appellee still being the owner of the land, the equities between the parties can as readily be adjusted and carried out as if the suit had been brought seven years ago.

The defendant below set up laches as a defense.

What is laches depends on the circumstances of each case and no absolute rule can be laid down, but it is submitted that laches cannot be attributed to the appellant until some knowledge is first brought home to him and the appellee will not in a court of equity gain an advantage by his own concealment and delay. He concealed the completion of the sale, delayed two years before taking his deed and four before recording it, and continued his concealment until the appellant accidentally discovered the facts.

The facts in this case, as alleged by the bill and admitted by the demurrer, show that the appellant did all that he was required to do in equity and good conscience: he immediately after the agreement proceeded to the county-seat and investigated into and reported upon the claim of Snow, as agreed. After his return to Canada, on finding that the appellee delayed in forwarding the deed as agreed upon, the appellant sent the agreement to the county-seat and had it recorded, thus giving notice to the appellee and all persons dealing with the property of his interest therein and his intention to claim under the agreement.

Certainly he was and is entitled to rest on this notice against the appellee, and until he acquired the knowledge

that the appellee had obtained a deed he was not equitably compelled to take any action against him.

Where an action for specific performance of an agreement to discontinue a suit was not begun until about ten years after the execution of the agreement, but it appeared that the loss of the stipulation was not discovered until about a year before the bringing of the action and defendant had suffered no harm from the delay, the defense of laches could not be interposed.

Deen *vs.* Milne (N. Y.), 20 N. E., 861; 113 N. Y., 303.

Where plaintiff, under a parol agreement to exchange lands, conveys his share as agreed and enters upon and improves the land to be conveyed to him under a promise of a deed, he is not guilty of laches when he files a bill for specific performance some ten years after.

Hunkins *vs.* Hunkins (N. H.), 18 A., 655.

If the delay is attributable to the defendant as well as plaintiff, the defendant cannot take advantage of it.

Loring *vs.* Palmer, 118 U. S., 345.

Where the facts were concealed by defendant he cannot take advantage of delay.

Badger *vs.* Badger, 2 Wall., 87.

Before the defendant can claim anything on account of the antiquated nature of the claim he must show that he has performed or has been ready to perform all substantial conditions precedent on his part.

House *vs.* Beatty, 7 Ohio, 89.

Generally, whenever the delay is attributable to the defendant, he will not be allowed to avail himself of it as a defense.

Morse *vs.* Merest, 6 Madchy, 25.

Per Lord St. Leonards in—

Ridgway *vs.* Wharton, 6 H. L. C., 237 and 292.

Equity will not relieve a party against his own neglect or default in performing his contract if such relief will seriously injure the other party.

Ruckman *vs.* King, 19 N. J. Eq., 361.

Mere lapse of time, unaccompanied by circumstances affording evidence of a presumption that the right has been abandoned, is not considered laches.

Wissler *vs.* Craig, adm't'r, 80 Va., 22.

The appellee set up below as a defense that there was no averment in the bill that the appellant had taken any steps toward obtaining a patent. It is sufficient to call the attention of the Court to the fact that this is to enforce specific performance by the appellee of his contract to execute and deliver a deed which is in no way dependent upon or connected with the obtaining of a patent for the land, and, further, the appellant in the contract does not undertake to obtain a patent, but only to pay the expenses for one when obtained. The bill avers that the appellant is and has always been ready and willing to comply with all the terms of the contract, which fact, as alleged, is admitted by the demurrer.

HENRY WISE GARNETT,
*Attorney for Appellant.*

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# SUPREME COURT UNITED STATES

OCTOBER TERM, 1894.

WILLIAM McCABE,
APPELLANT,
*Vs.*
JOHN O. MATTHEWS,
APPELLEE.

No. 109.

## BRIEF FOR APPELLEE.

### STATEMENT.

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of Florida. The appellant in this court was complainant below, and on demurrer to his bill the decree dismissing the bill from which the appeal is taken, was entered.

The opinion of the court below will be found reported in 40th Federal Reporter, 338.

Briefly stated, the facts shown by the Record are that the appellee secured from one Francis G. Montgomery, on the 9th day of February, 1880, an option to

purchase certain lands described. This contract is made an exhibit to the bill and will be found on pages 4 and 5 of the Record. Under the terms of this agreement the appellee was to have the option of purchasing the property described for forty-five days from date. On the 10th day of February, 1880, the appellee and appellant entered into a Contract in which the appellee agreed, for certain consideration, to assign to the appellant one-half interest in the lands mentioned in the agreement between appellant and Francis G. Montgomery in case the appellant should exercise his option to purchase said lands. This contract will be found on pages 5 and 6 of the Record.

In July, 1882, Francis G. Montgomery executed to appellee a deed for the lands described in the Contract, which deed was recorded in the proper offices for record on the 14th of July, 1884. This bill for specific performance was filed by appellant on the 1st day of March, 1889. It will be further observed that the Contract between appellant and appellee provided that said Contract was to be performed within three months from its date. The bill also alleges that the defendant has conveyed and mortgaged portions of the land.

Record, page 3, paragraph 10.

On pages 11 and 12 of the Record will be found affidavits as to the value of the land in controversy in 1889. This value is to be taken into consideration and compared with the value as fixed by the consideration named in the Contract referred to.

## ARGUMENT.

The relief sought by the bill in this case is specific performance of a contract, and all the authorities agree upon the statement that such relief is not a matter of

strict right, but that it rests in the sound discretion of the court taking into consideration all the facts and circumstances of the case.

Williard vs. Tayloe, 8th Wall, 557–565.

Galliher vs. Cadwell, 145 U. S., 368–371.

Seymour vs. DeLancy, 6th Johnson's Ch., 222.

Holt vs. Rogers, 8th Peters, 420.

Beach vs. Dyer, 93d Ill., 295–301.

Knox. vs. Spratt, 23d Fla., 64, 67.

An examination of the opinion of the court found in 40th Federal Reporter, p. 338, shows that the court below decided that the facts set forth in the bill show such inexcusable laches on the part of the complainant as to disentitle him to the remedy sought, and it seems clear to us that this view of the case is abundantly sustained.

Holt vs. Rogers, 8th Peters, 420.

McCabe vs. Crosier, 69th Ill., 501.

This decision is fully sustained by the Supreme Court of the State of Florida.

Knox. vs. Spratt, 23d Fla., 64, 67.

In the case at bar the complainant delayed seeking any relief for nearly nine years, without any sufficient justification for the delay. In the case just referred to in 23d Florida, the court held that the delay of two and one-half years in filing the bill was inexcusable under the facts of that case, and in that case, too, part of the purchase money had been paid, while it appears from the bill in this case that no purchase money has ever been paid, nor has any money ever been tendered. The facts stated in the bill,

taken together with the affidavits as to the value of the property in 1889, show this to be one of those cases in which a party seeking the remedy of specific performance has lain quietly by to see what would be the result of certain claims that were being made to the property by third parties; and then, when a favorable turn has been taken, to avail himself of a court of equity to obtain specific performance. It appears to us that the delay on the part of the appellant was totally inexcusable, and that no fact tending to an excuse for the delay has been stated in the bill. It seems to us that under all the circumstances the court was clearly justified in refusing the remedy of specific performance in this case.

All of which is respectfully submitted.

H. Bisbee,

*Counsel for Appellee.*